Budget Heating & Cooling, Inc. *and* Sheet Metal Workers International Association Union, Local 20, AFL–CIO. Case 13–CA–37925

November 30, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

Upon a charge filed by the Union on July 8, 1999, the General Counsel of the National Labor Relations Board issued a complaint on July 11, 2000, against Budget Heating & Cooling Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. A first amended complaint and notice of hearing issued on August 29, 2000, alleging violations of Section 8(a)(1) and (3) of the Act. On July 24, 2000, the Respondent filed an answer to the complaint, and on September 12, 2000, filed an answer to the first amended complaint. On October 24, 2000, however, the Respondent withdrew its answers.

On October 27, 2000, the General Counsel filed a Motion for Summary Judgment with the Board. On October 31, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Respondent, on October 24, 2000, withdrew its answers to the complaint and amended complaint. Such withdrawals have the same effect as failures to file an answer, i.e., the allegations in the complaint must be considered to be admitted to be true.[1]

Accordingly, based on the withdrawal of the Respondent's answer to the complaint and amended complaint, we grant the General Counsel's Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Lake Station, Indiana, has been engaged in the sales, service, and installation of heating and central air conditioning units. During the calendar year 1999, the Respondent, in conducting its business operations derived gross revenues in excess of $250,000, and during that same time period received gross revenue in excess of $50,000 for sales and the performance of services to firms including Winfield Group, Inc., and Oxford Homes which enterprises are directly engaged in interstate commerce. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times Brian Brown has been the owner/manager of the Respondent and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

At all material times Joyce McWhirter was the receptionist/office personnel of the Respondent and has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

About January 28, 1999, the Respondent, by Joyce McWhiter, at the reception area of the Respondent's facility, interrogated applicants for employment about their union membership, activities, and sympathies.

About February 18, 1999, Brian Brown, in his office at the Respondent's facility, threatened to close the company if the employees selected a union as their exclusive bargaining representative.

About February 18, 1999, Brian Brown, in his office at the Respondent's facility, threatened employees with unspecified reprisals if they selected a union as their exclusive bargaining representative.

About February 18, 1999, Brian Brown, in his office at the Respondent's facility, threatened not to hire applicants for employment based upon their union membership or activity.

About February 18, 2000, the Respondent, by Brian Brown, discharged its employee Mark Rehtorik.

[1] See *Maislin Transport*, 274 NLRB 529 (1985).

[2] In its letter to the Region withdrawing its answers the Respondent advised that it is in the process of "winding up its activities and filing a Petition in Bankruptcy under Chapter 7 of the Bankruptcy Code." It is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its full disposition. See, e.g., *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited there. Board proceedings fall within the exception to the automatic stay provision for proceedings by a governmental unit to enforce its police or regulatory powers. See id. and cases cited therein.

Since about February 25, 1999 and continuing to date, Respondent, by Brian Brown, refused to consider Dan Nelson for hire.

About April 24, 1999, the Respondent, by Brian Brown, refused to hire Dan Nelson.

The Respondent discharged Mark Rehtorik and refused to consider Dan Nelson for hire and refused to hire him because they assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by discharging Mark Rehtorik, we shall order the Respondent to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. In addition, having found that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Dan Nelson, we shall order the Respondent to offer him immediate instatement to the position to which he applied or, if that position no longer exists, to a substantially equivalent position. *FES (A Division of Thermo Power)*, 331 NLRB No. 20, slip op. at 4 (2000).[3] Further, the Respondent shall make both employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4] The Respondent shall also be required to expunge from its files any and all references to the unlawful discharge of Mark Rehtorik and the unlawful failure to hire and consider for hire Dan Nelson, and to notify them in writing that this has been done.

ORDER

The National Labor Relations Board orders that the Respondent, Budget Heating & Cooling, Inc., Lake Station, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its applicants for employment about their union membership, activities, and sympathies.

(b) Threatening to close the company if the employees selected a union as their exclusive collective-bargaining representative.

(c) Threatening employees with unspecified reprisals if they selected a union as their exclusive bargaining representative.

(d) Threatening not to hire applicants for employment based upon their union membership or activity.

(e) Discharging and failing and refusing to hire or to consider for hire individuals because they formed, joined, or assisted the Union and its constituent members or engaged in concerted activities, or to discourage employees from engaging in these activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Mark Rehtorik full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Within 14 days from the date of this Order, offer Dan Nelson instatement to the position to which he applied or, if that position no longer exists, to a substantially equivalent position.

(c) Make Mark Rehtorik and Dan Nelson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy portion of this decision.

(d) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful discharge of Mark Rehtorik and failure and refusal to hire and to consider for hire Dan Nelson, and within 3 days thereafter notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

[3] The Respondent also unlawfully refused to consider Nelson for hire, but it is unnecessary to provide the standard *FES* remedy for that violation (requiring the Respondent to place Nelson in the position he would have been in, absent discrimination, for consideration for future openings in accord with nondiscriminatory criteria). See *FES*, 331 NLRB No. 20, slip op. at 7. This is so because we are providing Nelson with the more comprehensive relief of an instatement order. In other words, the limited remedy for the refusal to consider violation is subsumed within the broader remedy for the refusal to hire violation.

[4] As noted, the Respondent has asserted that it anticipates filing Chapter 7 bankruptcy proceedings. Such a filing may implicate the instatement and reinstatement remedies of this Order. In that event, the Respondent may raise in compliance the issue of the appropriateness of those remedies.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Lake Station, Indiana, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 28, 1999.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 30, 2000

John C. Truesdale, Chairman

Wilma B. Liebman, Member

Peter J. Hurtgen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate applicants for employment about their union membership, activities, and sympathies.

WE WILL NOT threaten to close the company if our employees select a union as their exclusive collective-bargaining representative.

WE WILL NOT threaten our employees with unspecified reprisals if they select a union as their exclusive bargaining representative.

WE WILL NOT threaten not to hire applicants for employment based upon their union membership or activity.

WE WILL NOT discharge and fail and refuse to hire or to consider for hire individuals because they formed, joined, or assisted the Union and its constituent members or engaged in concerted activities, or to discourage employees from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Mark Rehtorik full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL offer Dan Nelson reinstatement to the position to which he applied or, if that position no longer exists, to a substantially equivalent position.

WE WILL make Mark Rehtorik and Dan Nelson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL remove from our files any and all references to the unlawful discharge of Mark Rehtorik and failure and refusal to hire and to consider for hire Dan Nelson, and within 3 days thereafter notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

BUDGET HEATING & COOLING, INC.

[5] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."